

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAN TORRES,

Defendant-Appellant.

UNPUBLISHED

January 5, 2010

No. 289244

Leelanau Circuit Court

LC No. 07-001575-FH

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentences imposed following his plea-based convictions of delivery of 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), and maintaining a drug house, MCL 333.7405(1)(d).¹ Defendant was initially sentenced to consecutive prison terms of 5 to 20 years for the delivery conviction and 16 to 24 months for the drug house conviction. However, following post-sentencing motions, the trial court amended the sentences to run concurrently after determining that maintaining a drug house could not be used as a felony for the purpose of consecutive sentencing under MCL 333.7401(3). We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant first argues that the trial court erroneously scored ten points for prior record variable (PRV) 7. When scoring the guidelines, “[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Facts used in the scoring of a sentencing factor need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). We review scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present

¹ In return for defendant’s plea, a charge of possession with intent to deliver marijuana was dismissed.

questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

MCL 777.57(1)(b), which governs the scoring of PRV 7, provides that ten points may be scored when the offender has one subsequent or concurrent felony conviction. MCL 761.1(g) provides that a felony “means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.”² Two-year misdemeanors are considered as felonies for the purposes of the habitual offender, probation, and consecutive sentencing statutes. *People v Smith*, 423 Mich 427, 434, 439; 378 NW2d 384 (1985). Thus, in the context of sentencing, a violation of MCL 333.7405(1)(d) is a felony because it carries a maximum prison term of two years. MCL 333.7405(2); MCL 333.7406. See also MCL 777.13m (stating that this chapter applies to “the following felonies” and listing MCL 333.7405(1)(d) as a class G offense). We therefore affirm the trial court’s scoring decision with respect to PRV 7.

Defendant next argues that the trial court erred when it failed to sentence him to an intermediate sanction for his conviction for maintaining a drug house. The guidelines for this offense were zero to 17 months. Defendant argues that, pursuant to *People v Muttscheler*, 481 Mich 372; 750 NW2d 159 (2008), he was entitled to be sentenced to an intermediate sanction absent a substantial and compelling reason to depart, and that a prison sentence does not fall within an intermediate sanction. *Id.* at 375.

Muttscheler involved a prisoner who committed a crime while incarcerated and who was sentenced to 12 to 30 months in prison, to be served consecutively to the sentences he was already serving. *Id.* at 373-374. In that situation, the defendant presumably could have served his full prison sentence before being sentenced to an intermediate sanction for the second crime. In contrast, the instant case involves concurrent sentencing. Defendant has pointed to nothing to show that the trial court could have given him a concurrent intermediate sanction such as a jail term at the same time it sentenced him to a prison term for the delivery conviction. Under the circumstances, we simply cannot fashion a remedy for defendant. See, e.g., *People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra

² The Michigan Sentencing Guidelines Manual provides a substantially similar definition of a felony.